

Supreme Court, U.S.
F I L E D

NOV 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 90-554

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JACK R. THOMAS,

Petitioner,

vs.

THE GARRETT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Certiorari be granted where the arguments advanced on appeal were issues District Court concluded and evaded by the Circuit Court with overwhelming evidence of perjury and valid conflict among the circuits as to the issues raised in the petition.

LIST OF PARTIES

PETITIONER:

JACK R. THOMAS, Proper

RESPONDENTS:

THE GARRETT CORPORATION

and

ALLIED SIGNAL, INC., SUCCESSOR AND
SUBSIDIARIES

Allied-Apical Company (Partnership)
Allied-General Nuclear Services (Partnership)
ACE, limited
ACE Cayman Islands Limited
Allied Automotive Ltda.
Allied-Signal Ltd.
Bendix Systemes Vehicules Industriels S.A.
Bendix Europe, S.A.
Amoricaine de Fonderia Le Chatelet, S.A.
Bendix Deutschland GmbH
Bendix Espana, S.A.
Bendix Europe Aftermarket S.A.
Bendix Europe Services Techniques S.A.
Bendix France, S.A.
Societe Civiel Immobiliere Prieur & Cie
Bendix Italia S.p.A.
Bendix Altechna
Bendix Ricambi, S.p.A.
Cierock Ricambi, S.p.L.
Bendix Portuguesa Sociedade de Equipamentos
Automoveis, Limitada
D.B.A. S.I.B.E., SNC
France Automobile Service, S.A.

Lucas Air Equipment S.A.
Sifra Industries, S.A.
TENZA, S.A.
Transpar Iberica, S.A.
Bendix Mexicana, S.A. de C.V.
Endevco Corporation
Ferranti plc
Fram Italiana S.p.A.
FLAAM Filter, S.p.A.
Garrett GmbH
Garrett Productos Automotrices S.A.
Jurid Werke, GmbH
Asia Pacific Resin Corporation
Doosan Electro Materials Co., Ltd.
Financiere Allied-Signal, S.A.
Nittobo-Norplex/Oak Inc.
Norplex Oak India Limited
Oak/Mitsui Inc.
Sistemas Bendix de Seguridad S.A. de C.V.
Seo Han-Bendix Company Limited
Kalyani Brakes Limited
Bendix Electronic Service Corporation de Espana, S.A. (I)
Bendix Jidosha Kiki Corporation
Bendix Mintex Proprietary Limited
Bendix Group Super Annuation Pty., Ltd.
Bunker Ramo Electronic Data Systems, S.A.
Chico Corporation
Coalition Remedial Efforts, Inc.
Compania Industrial de Fluorita, S.A.
Compania Metalurgica de Parral, S.A.
UOP Inter-Americana, Inc.
Nikki-Universal Co., Ltd.
Union Shows K.K.

UOP Management Services (Saudi Arabia) Limited
 Shanghai UOP-UCC Molecular Sieve Co., Ltd.
 Garrett Comptronics Licensing Corp.
 Globe Auto Electricals, Ltd. (I)
 Hankuk Brake Industrial Co., Ltd.
 International Robomation Intelligence Inc.
 International Technigroup Inc.
 Industrial Turbines Interanational Inc.
 International Turbine Engine Corporation (I)
 Japan Gasoline Co., Inc.
 Jidosha Kiki Co., Ltd.
 JSR Allied Corporation
 Leaseway All-Services, Inc.
 Lucky Allied Plastics Corporation
 Manbritt Industries, Inc. (N)
 Nippon Amorphous Metals Co., Ltd.
 Nirlon Synthetic Fibres and Chemicals, Ltd.
 Nitto Boseki Company Ltd.
 Normalair Garrett (Holdings) Ltd.
 Normalair Garrett Ltd.
 Dynamic Turbocharger Services Pty., Ltd. Queensland
 Dybanuc Turbocharger Services Pty., Ltd. Victoria
 Prestolite of India Ltd. (I)
 Quimobasicos, S.A.
 Propelentes Mexicanos, S.A. Societe d'Etudes et de
 Constructions Aero-Navales [SECAN]
 Sofratype, S.A.
 Synektron Corporation
 Turbodina S.A.I.C.
 Union Texas Exploration Corporation
 Union Texas International Corporation
 Union Texas Petroleum Holdings, Inc.
 USHA Amorphous Metals Ltd.

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JURISDICTION

Petitioner invokes jurisdiction of this Court under 28 U.S.C.1254 (1). The jurisdiction of the district court and the court of appeals was based upon diversity of citizenship of the parties, pursuant to 28 U.S.C. Section 1332.

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RIGHT TO COURT

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g. ICC v. Louisville and N.R. Co. 227 U.S. 88, 93-94 (1913); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-104 (1963).

In the Sixth Circuit Court of Appeals, e.g. Reid v. Sears, Roebuck and Co., 790 F.2d 453, 460-461 (6th Cir. 1986) the factor in determining a handbook's effect on the employee at will relationship, was whether or not there was a showing that the handbook had been written or approved by the president or a vice president of Sears.

In the Ninth Circuit Court of Appeals the court affirmed a personnel manual that clearly and conspicuously tells employees that the manual is not part of the employment contract and that their jobs are terminable at will. Citing Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984).

The respondent's clearly work a farce & sham upon this Court by not clarifying for this Court's attention that the two Circuit Court's have a difference in opinions on how they resolve the issue of determining the employee at will relationship. Certainly this variance of opinion is proper grounds for this Court to grant the Writ of Certiorari to resolve this difference.

In the District Court level, the case never got into the crux of the matter pertaining to disclaimer, and wrongfully terminated the proceeding by granting a Summary Judgment to the respondent's based upon a signature on a job application wherein a clause pertaining to at will and termination with or without cause was neatly tucked in and where the District Court never asked any question in open Court of the petitioner to determine whether the signature was in fact the petitioner's, and whether petitioner did in fact recognize or understand the consequences of signing a job application with an at will clause. The District Court never allowed the petitioner one iota of contradiction or whether petitioner intentionally waived his right of redress.

The District Court further stated in their opinion that—

....The Handbook states that the Company appeal procedures are available to all regular full time employees, and were applicable in this instance, plaintiff's arguments to the contrary being without merit. Although plaintiff knew that appeal procedures existed, he did not take any action to invoke the procedures as specified and explained in the Handbook at the time of the layoff. Exhibit 2-10

The District Court's conclusion regarding this appeal procedure was totally ludicrous and in direct contravention of stated testimony in the only evidence before the District Court in the Deposition of Jack R. Thomas as pointed out on appeal to the Ninth Circuit Court of Appeals and presently before this Honorable Court once again.

The court of appeals did not address, nor was its decision based upon, the exhaustion of remedies issue. The court of appeals chose instead to affirm on the at will issue which had not been resolved in the district court at all with any questions to the petitioner. Contravention of ICC v. Louisville and N.R. Co. Ibid.

Petitioner has heard the District Court and the Ninth Circuit Court of Appeals affirm their position regarding at will pursuant to state law of Arizona and supports the fact that petitioner has every right to present to this Court Question #1 as presented inasmuch as there is no adequate remedy other than the United States Supreme Court to determine whether at will clause of employment is legal or constitutional.

A federal court cannot pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. Baker v. Carr, 82 S.Ct. 691, 369 U.S. 186, 7L.Ed.2d 663.

Prisoners are not men without rights. While they have been

incarcerated, "one who is behind prison walls does not automatically surrender all rights," McDonough v. Director of Penitentiary, 429 F.2d. 1189, 1192 (4th Cir. 1970). "A prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law," Coffin v. Reichard, 143 F.2d. 443, 445 (6th Cir. 1944). cert. den. 325 U.S. 887, 65 S.Ct. 1568, 89 L.Ed. 2001 (1945).

This case is completely devoid of any evidence which would show this Court that the petitioner ever waived any of his constitutional rights under the First, Fifth, Sixth, Fourteenth Amendments to the United States Constitution.

In fact the record shows clearly where the respondent has repeatedly lied to the District Court and the Ninth Circuit Court of Appeals regarding the petitioner's lack of invoking the grievance procedure in the Garrett Corporation. Not one shred of evidence was ever entered by the respondent in support of this fraudulent theory. While the petitioner had evidence before the Ninth Circuit Court of Appeals to the contrary. See petitioner's "Supporting Memorandum Rebuttal" cause No. 89-15041 before the Ninth Circuit Court of Appeals, petitioner's "Affidavid" wherein stated:

8. Garrett's in-house appeal procedure is not set-up as a matter of right even for full-time employees.
10. I filed a immediate grievance with Mal Craig, President of Garrett Turbine Engine Company within seven days of my lay off and received no response.
11. Garrey Corporation misled the District Court into a belief that all employees presently employed are "At Will".

Exhibit 2-8

12. Garrett Corporation intentionally denied information through deceit with malicious intent to conceal favorable discovery before Summary Judgment.
13. Garrett Corporation conspired to deny me promotion to job classification (dispatcher), labor grade eleven prior to lay-off, contrary to CR19 page 5, concerning "promotions" of the policy "Working Together at Garrett".
14. That my wife was hospitalized and off work a month as a direct cause of Garrett Corporation invidious and illegal actions against me.
15. Garrett Corporation caused excessive financial damage to me and my family as a direct cause of their actions, causing irreparable damage and loss of wages and investments in the stock plan.
19. I was never advised by any representative of the Garrett Corporation that the "At Will" clause in the job application would waive my Constitutional Rights under the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

No evidence in contravention to this "Affidavid" was ever submitted by the respondent's herein.

A second "Affidavid" was submitted in the Ninth Circuit Court of Appeals in petitioner's "Exception to Appellee's Objection to Appellant's Request for Judicial Notice" which state in pertinent part that:

1. Appellee had in their possession the letter to Mal Craig, President of the Garrett Turbine Engine Company at the time of appellant's lay-off. Mr. Craig sent this letter of complaint to Mr. Frank

Exhibit 2-7

Zembick who was in charge of the grievance arbitration procedure.

2. This letter of complaint was never responded to by any person in the grievance arbitration procedure.
3. Clearly no response by the Garrett's Corporation through their own grievance arbitration procedure shows that the statement in CR23, pages 16-18 of Plaintiff's Reply to Summary Judgment Motion, where plaintiff argued to the Court that Garrett's grievance/arbitration procedure was not applicable to him, was a clear and concise point.
4. The presence of this letter to Mal Craig, President of Garrett Turbine Engine Company at the time of plaintiff-appellant's lay-off, and in possession of the Garrett/arbitration procedure, and concealed knowingly by the defendant's appellees' shows conclusively that the appellee's committed fraud upon the Court when they were instrumental in making the District Court believe that plaintiff-appellant had not utilized the Garrett grievance/arbitration procedure. The United States Supreme Court has repeatedly stated that "a lie is a lie".

Once again the respondent did not enter one shred of evidence or contravening facts supported by oath and affirmation contrary to the evidence before the Ninth Circuit.

Inasmuch as the Ninth Circuit Court of Appeals had this evidence before them, they erred in not responding to this evidence thereby disallowing petitioner an appeal contrary to the District Court's statement that petitioner had not invoked the Garrett appeal procedure per opinion of that court.

Wherefore, Question #2 presented in this Court is an

appropriate question for this Court to resolve in the Writ of Certiorari contrary to the false premise of the respondent.

It strengthens even more the necessity for this Court to consider the At Will clause of employment which prevents from consideration in the lower court's the fact that false evidence was instrumental in denying petitioner from a proper forum of redress of grievance.

CONCLUSION

For the foregoing reasons, this Court should review by a writ of certiorari and should award petitioner damages against Garrett and reimburse petitioner for all legal costs and fees associated with this proceeding, pursuant to Supreme Court Rule 42.2.

RESPECTFULLY SUBMITTED this 7th day of November, 1990.

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